APPENDIX - PERTINENT PORTIONS OF TRIAL TRANSCRIPT

-A-

MR. DIROSA:

Let me object, for the record, to the ruling of the Court. I think that the problem this creates for my client is that there are only three people that are on the scene, two people in the car; there's one gun at issue, and my client's defense is based on the fact that Mr. Smith was the one in possession of that gun, and I think this creates a question in the jury's mind as to why my client has refused to call the other person who he was in the car with, and I think the implication from that may be that that person could not substantiate the story that my client gives. So I think that seriously creates a problem and denies me of — or my client of the due process right of calling the witnesses that he thinks are necessary in this defense.

* * *

-B-

Q. Mr. Haddad, what's the name of the bar you went to?

A. It was Key West.

Q. Kenny's Key West? Who came to pick you up at the store?

A. Andrea and my friend Roberto.

Q. Okay. And what about Lionel? Where did —

A. Lionel was at the club with his girlfriend, Mandy, and everybody, they were there, they met us there.

17. All right. So who all was drinking at the bar that night?

A. I was drinking. Everybody was pretty much drinking.

Q. But who was there in your group? Who was there with you celebrating your birthday at Kenny's Key West?

A. I know the people that rode with me, but I don't remember everybody that was there. I mean —

Q. Okay.

A. — I know Roberto was there, Lionel was there, Andrea was there, Mandy was there, uh . . . a couple — a couple other people, but, I mean, I'm not too sure about —

Q. What were you drinking that night, Mr. Haddad?

A. Budweiser, Bud Lite.

Q. That's all?

A. Yeah, I don't drink too much.

Q. Okay. All those people, Mandy, Roberto, where are they today?

A. Working.

Q. They're not going to come in here and testify, right?

A. No.

* * *

Appendix

-C-

(The following conversation occurred at the Bench, out of earshot of the jury.)

MR. FUTRELL:

I didn't say Lionel.

MR. DIROSA:

I know you didn't say Lionel, but Lionel's obviously in the car, and this brings up the same problem that I said before. I think somehow the jury has to understand that we subpoenaed and had Lionel over here to testify, and that, due to a ruling of the Court, he was unable to testify today, because, obviously, they're going to be left with the implication, "Well, what — why not? Why wasn't he called?" Now, he says he can't find Andrea — and we couldn't find Andrea.

MR. FUTRELL:

Judge, all I asked him was who was drinking with him at the bar, and then I asked where Roberto and, um, where are they. Roberto and I can't remember the other person's name — he said Mandy — where are they? That's all I'm going to ask him. If I ask him anything else —

MR. DIROSA:

The implication is you should call somebody that was with you. That's Lionel; and we had him here, and the jury doesn't know that.

THE COURT:

You want to respond to his suggestion about the Court telling them that he was called, and because of the ruling of the Court —

MR. FUTRELL:

Judge, I mean, if that's the case, then put him on the stand. I mean, the purpose of him — I mean, they can't — he can't have it both ways. He can't — I mean, if the Court's ruling is that he can't put a witness on who's going to take the Fifth Amendment, if we know he's going to take the Fifth Amendment, but I think the purpose of that is so the jury doesn't see that person come on the stand and take the Fifth Amendment. What good does it do now to put on the stand if there're going to find out that he's going to take the Fifth, and that's why he's not — why he's not testifying?

MR. DIROSA:

But it seriously prejudices me to have the only other guy who's there appear — it appear to the jury that I'm not calling the only other person who's there.

MR. FUTRELL:

Judge, that's why Mr. DiRosa's statement how the jury's going to view it. I mean, I can't help it. A lot of things prejudice him. He's prejudiced in that his guy's got a gun in his waistband. I mean —

THE COURT:

Okay. Okay. I'm — your objection's on the record.

MR. DIROSA:

Okay. Thank you.

(End of the Conference)

* * *

-D-

MR. DIROSA:

Okay. And — oh, once again, I'm going to ask, since I don't think you ever ruled on the motion that we would inform them that Lionel Smith had been called and that, through a ruling of the Court, he would not be permitted to testify, or something to that effect —

THE COURT:

Okay. I'm not.

MR. DIROSA:

Okay.

THE COURT:

So your request is overruled, I guess.

MR. DIROSA:

Okay.

(End of the Bench Conference)

* * *

Appendix

-E-

MR. FUTRELL:

. . . He talks about Mark Smith is — or Lionel Smith — excuse me — is driving erratic, and Lionel Smith is doing this, and Lionel Smith must be the bad guy. Lionel Smith gives the wrong name because he's got attachments out for him, and he knows it. And what else is interesting? Lionel Smith can have a gun, because he's not a convicted felon. He didn't book him for 95.1, felon in possession of a firearm. You know why? 'Cause he's not a convicted felon. He can have that gun. **So why is Lionel Smith going to dump the gun? Is that reasonable?** Ladies and gentlemen, that's what it comes back to. When you go in the jury room, ask yourself, "What's reasonable, and who do I believe? Who do I believe? . . ." (Emphasis added)